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Docket No. A-1426-84T7

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SUPREME COURT OF THE

UNITED STATES

Term 1985

MATTEO GIAMMARIO, OSCAR GIBSON, EDWARD HIRSCH, CHARLES HOGAN, WALTER KRICHLING, OCTAVIUS LA CROSS, EARL MURPHY, EVE PANARO, and TOBY PONTANI,

Plaintiffs-Petitioners

vs.

TRENTON BOARD OF EDUCATION and TRENTON ADMINISTRATORS AND SUPERVISORS ASSOCIATION,

Defendants-Respondents

On Appeal from the Supreme Court of the State of New Jersey

Petition for Writ of Certiorari to Review the Judgment of the Supreme Court of the State of New Jersey

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. May an employment policy which discriminates against older workers be legally justified by a reasonable factor other than age, absent a showing that the policy is necessary due to the legitimate business concerns? 29 U.S.C. §§623(a)(b) and (f)(1).

2. May the economic considerations inherent in the collective bargaining process constitute a legally justifiable basis for a provision in a labor contract which discriminates against older workers? 29 U.S.C. §623(f)(1).

3. Does a prior adverse decision by the New Jersey Division on Civil Rights bar recovery by petitioners Hogan and Krichling, absent a hearing of any kind, when the discrimination is of a continuing nature?

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Giammario, et al vs. Trenton Bd. of Education, et al, Docket No. L-18817-83, Superior Court of New Jersey, Law Division, October 1, 1984 - unpublished opinion. (See Appendix)

STATEMENT OF JURISDICTION

On October 3, 1985 the New Jersey Supreme Court entered an Order denying the plaintiffs' Petition for Certification (A-1). The prior Petition for Certification was filed to request review of a decision of the Superior Court of New Jersey, Appellate Division, dated August 8, 1985 (A-2) under Docket Nos. A-1436-84T5, A-1599-84T5, which reversed the trial court's decision in favor of the plaintiffs.

The controversy involves discrimination claims in violation of the federal and state statutes. The decisions of both the trial court and Appellate Division were rendered based upon its respective interpretations

of the applicable federal law.

The Supreme Court of the United States has the ability to exercise jurisdiction over this matter pursuant to 28 U.S.C §1257(3).

TEXT OF AUTHORITIES

28 U.S.C.

SECTION 1257(3):

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

29 U.S.C.

SECTION 623(a):

> It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

SECTION 623(c):

It shall be unlawful for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

SECTION 623(f):

It shall not be unlawful for an employer, employment agency, or labor organization-

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system of any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

N.J.S.A.

SECTION 10:5-12(a):

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

(a) For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, sex or a typical heredity cellular blood trait of any individual, or because of the liability for service in the Armed Forces of the United States, of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the Armed Forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise.

SECTION 10:5-12(b):

It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:

(b) For a labor organization, because of the race, creed, color, national origin, ancestry, age, marital status or sex of any individual, or because of the liability for service in the Armed Forces of the United States or nationality of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members, against any applicant for, or individual included in, any apprentice or other training program or against any employer or any individual employed by an employer; provided, however, that nothing herein contained shall be construed to bar a labor organization from excluding from its apprentice or other training programs any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular apprentice or other training program.

SECTION 10:5-12(e):

It shall be an unlawful employment

practice, or, as the case may be, an unlawful discrimination:

(e) For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

SECTION 10:5-13:

Any complainant may initiate suit in Superior Court under this act without first filing a complaint with the division or any municipal office. Prosecution of such suit in Superior Court under this act shall bar the filing of a complaint with the division of any municipal office during the pendency of any such suit. (Set out in full in Appendix)

SECTION 10:5-27:

The provisions of this act shall be construed fairly and justly with due regard to the interests of all parties. Nothing contained in this act shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this State relating to discrimination because of race, creed, color, national origin, ancestry, marital status or sex or liability for service in the Armed Forces of the United States; except that, as to practices and acts declared unlawful by section 11 of this act, the procedure herein provided shall, while pending, be exclusive; and the final

determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. Nothing herein contained shall bar, exclude, or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful discrimination.

29 C.F.R.

SECTION 860.105(b);

Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this Act . . ."

(b) Seniority systems not only distinquish between employees on the basis of their length of service, they normally afford greater rights to those who have the longer service. Therefore, adoption of a purported seniority system which given those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, by a "subterfuge to evade the purposes" of the Act. Further-

more, a seniority system which has the effect of perpetuating discrimination which may have existed on the basis of age prior to the effective date of the Act will not be recognized as "bona fide".

SECTION 860.105(c):

Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this Act . . ."

(c) Unless the essential terms and conditons of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will also be regarded as lacking the necessary bona fides to qualify for the exception.

SECTION 860.120(a)(1):

(a)(1) General. Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this

Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(e) of this Act because of the age of such individuals." The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans to meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, on behalf of an older worker is equal to that made or incurred on behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since

section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following sections explain three key elements of the exception: (i) What a "bona fide employee benefit plan" is; (ii) what it means to "observe the terms" of such a plan; and (iii) what kind of plan, or plan provision, would be considered "a subterfuge to evade the purposes of (the) Act." There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans. For a discussion of the provisions in section 4(f)(2) forbidding the failure to hire any individual or the involuntary retirement of any individual, see S.860.110 of this chapter.

SECTION 1625.7(d):

Differentiations based on reasonable factors other than age.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it

is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this title.

STATEMENT OF THE CASE

This petition seeks review of the Final Judgment of the Supreme Court of New Jersey denying plaintiff's petition for certification to review the judgment of the Superior Court of New Jersey, Appellate Division. The Appellate Court Decision reversed a prior decision of the Law Division in favor of petitioners which held respondents (defendants below) had committed acts of unlawful age discrimination in violation of federal and state law. Petitioners (plaintiffs below) were awarded damages in the amount of $50,000.00, together with accumulated interest and counsel fees for a total of approximately $80,000.00.

The opinions rendered below turned on interpretations of solely federal law (Appendix pgs. A-6, A-13).

The controversy centers on provisions in the collective bargaining agreement between respondent employer, Trenton Board of Education, and respondent union, Trenton Administrators and Supervisors Association (T.A.S.A.). The provisions involve compensation in the form of additions to annual salaries based on longevity of services, so that age is necessarily a correlary factor.

In their Complaint, petitioners charged respondents with unlawful employment discrimination based on age, in violation of both federal and state statutes. Age Discrimination in Employment Act (A.D.E.A.) 29 U.S.C. §623(a) and (c); New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 §(a), (b) and (c).

Prior to the implementation of the July 1, 1979, Collective Bargaining

Agreement, the controlling contract provided that an additional $400.00 be paid employees beginning in their twentieth year of service. Two additional increments of $200.00 each were to take effect on the thirty-fifth and fortieth years of service.

The new contract, effective July 1, 1979, provided for annual increments of $600.00 beginning in the twentieth year of service and for additional $600.00 increments to commence on the twenty-fifth, thirtieth, thirty-fifth and fortieth years of service.

The provision was interpreted by respsondents to be prospective only, so that $600.00 increments were applied only to future anniversary dates. Petitioners and other employees who had reached longevity milestones prior to July 1, 1979, continued to be paid

at the lower rate of $400.00 after twenty years and additional $200.00 payments after the thirty-fifth and fortieth years of service.

Petitioners contend that respondents have adopted a compensation scheme which accords lower longevity benefits to the more senior employees. Due to the natural correlation between seniority and age, the policy discriminates against older employees, who receive less compensation than their younger colleagues for the same years of service.

Factually, the trial court found that as of July 1, 1979, 46 of the 92 union members (fifty percent) had at least twenty years of credited service with the employer and were eligible for at least one longevity increase. The average age of the group who was denied increased benefits was 54.2 years.

In the five years following the implementation of the 1979 contract, 19 union members became eligible for longevity benefits at the increased rate and the average age of this group was 41.4 years. The trial court held that the policy of applying the increased benefits prospectively had an adverse disparate effect on only older workers.

The trial court also found disparity of <u>treatment</u> involving petitioner Matteo Giammario. Having reached his twentieth year of service in 1973 and his twenty-fith year of service in 1978, he was paid under the old contract, which granted only a $400.00 increment effective from the twentieth year, and did not recognize or award the twenty-fifth year anniversary. Thus, from 1973 until his thirty-fifth year of service in 1988, petitioner Giammario

will receive an annual longevity benefit of only $400.00. At the same time, younger workers who reached their twentieth and twenty-fifth years of service after July 1, 1979, would receive the additional longevity benefits.

On July 1, 1982, respondents entered into a renewal contract containing similar longevity provisions and have continued to apply it prospectively only.

Petitioners succeeded at trial in establishing their federal and state claims of discrimination based on age, with the Court relying primarily on interpretations of federal precedents.

The Appellate Court, relying on similar authorities, reversed and held that the nature of the collective bargaining process, with the inherent need for fiscal compromise, is a reasonable factor to legally justify

discrimination against older workers.

The impact of this decision far surpasses the interests of the respective parties in the instant matter. The collective bargaining exception created by the Court in the instant matter will clearly have a substantial effect on virtually all of the school labor relation processes in the State of New Jersey.

Potentially, this unsupported legal caveat could be used as a basis for age discrimination in labor-management negotiations in collective bargaining processes throughout the country. The constitutionally protected interests of the aged, in the federal and state government as well as the private sector, could be substantially ravaged under the guise of fiscal constraints.

ARGUMENT

I.

Defendants have twice adopted a policy which has and will continue to accord greater longevity benefits to younger employees. Both the Trial and Appellate Courts found that the policy had an unlawful disparate impact on older workers. However, the Appellate Court reversed, holding that such an impact could be justified by the proffering of a reasonable factor other than age.

It is well established that upon a showing by plaintiff that a policy has a disparate impact on a protected group, an employer will be found to have committed unlawful discrimination, absent a showing that there is a business necessity for the policy, or that a given requirement is manifestly related

to employment. Griggs vs. Duke Power Company, 401 U.S. 424 (1971); Connecticut vs. Teal, 457 U.S. 440 (1982); Dothard vs. Rawlison, 433 U.S. 321 (1977); Geller vs. Markham, 635 F. 2d. 1027 (2nd Cir. 1980), cert. denied 451 U.S. 945 (1981); U.S. vs. Bethlehem Steel Corp., 446 F. 2d. 652 (2d Cir. 1971); 29 C.F.R. §1625 7(d).

For the Appellate Court to rule that disparate impact may be justified by a reasonable factor other than age is against the substantial weight of controlling decisions.

The Appellate Court also disregarded prior judicial authority on the issue of discriminatory intent, holding that a stipulation of the parties, which stated there was no direct evidence of discriminatory intent, was a sufficient basis for finding the respondents had

acted unintentionally. However, the stipulation was not intended to be given that broad an application. Intentional discrimination may be inferred from a demonstration of disparate treatment without direct evidence of animus. Teamsters vs. United States, 431 U.S. 324 (1974); United States vs. Bethlehem Steel Corporation, 312 F. Supp. 977 (W.D. NY 1970), order modified on other grounds, 466 F. 2d. 652 (2d Cir. 1971). The requisite intent is that the acts were purposeful, rather than accidental, such as the drafting of a policy which denies equal compensation to older employees. E.E.O.C. vs. Bordens Inc., 724 F. 2d. 1390, 1393 (9th Cir. 1984); United Papermakers and Paperworkers vs. U.S., 416 F. 2d. 980, 996-7 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

Here the respondents were clearly aware that the policy would necessarily result in disparate treatment of older workers and have continued implementing the differential pay policy even though the effect of its policy on older workers has been made additionally obvious during the various challenges. Indeed, the respondents have reaffirmed the intent of their actions by continuing the policy in their 1982 contract, despite full knowledge of its discriminatory effect.

Therefore, it is respectfully submitted that the Appellate Court denied petitioners the protections guaranteed them by federal and state law. By holding that the disparate impact and treatment of the labor provisions could be justified without a showing of business necessity, and by failing to consider the abundant evidence of intentional discrimination

as an alternate basis for recovery, the Court has opened an avenue for rampant discrimination in the labor market.

II.

The Appellate Court has fashioned a rule that a facially neutral policy adopted through collective bargaining, which has an "incidental" discriminatory impact on older workers is not unlawful. Because the Appellate Court has ruled that the collective bargaining process is by its very nature a reasonable factor other than age, the Court has necessarily authorized obvious discrimination. Application of this rule would permit older workers to be shut out from the benefits previously gained through the collective bargaining process and invites unions and employers to sacrifice the best interests of older workers in order to facilitate contract negotiations.

The federal statute prohibits employees and labor organizations from discriminating on the basis of age and

from classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities, . . . because of such individual's age", 29 U.S.C. §§623 (a)(2) and (c)(2) (emphasis supplied). Here, classifying employees in terms of whether a longevity milestone was reached prior to the effective date of the collective bargaining agreement clearly deprives older workers of the opportunity to receive as provided by the contract greater longevity benefits. The fact that the discriminatory classification was a product of the collective bargaining process is not a reasonable factor other than age since it does not amount to a separate non-age related basis for the policy.

It has been generally held that the collective bargaining process must

not yield results offensive to the laws against discrimination.

> The employer and union cannot agree to terms in a labor contract which violate . . . federal statutes . . . The terms of any collective bargaining agreement must comply with federal laws that prohibit discrimination. U.S.E.E.O.C. vs. County of Calumet, 686 F. 2d. 1249, 1255 (7th Cir. 1982), quoting U.M.W.A. Health and Ret. Fund vs. Robinson, 455 U.S. 562, 575 (1982).

An individual's right to be free from employment discrimination may not be waived by union activity; each employee has a right to be free from discriminatory practices. Alexander vs. Gardner Denver Co., 415 U.S. 36 (1974). Congress created substantive goals for individuals, which are superior to the collective ability of employees to bargain effectively. This is true of age discrimination in the workplace. Calumet, supra, 686

F. 2d. at 1256. In the absence of statutory exceptions, legislative prohibitions of age discrimination in employment take precedence over a collective bargaining agreement. Levine vs. Farleigh Dickinson, 646 F. 2d. 825, 832 (3rd Cir. 1981).

Despite the existence of much authority to the contrary, the Appellate Court would allow respondents to deprive older workers of equal benefits because cost cutting measures are mandated by the collective bargaining process. This holding is based on the rationale that labor negotiations would be chaotic if a facially neutral negotiated compromise having a disparate impact was held to be unlawful.

The policy in the instant case was not a "necessary compromise", because, as the trial court noted, any reduction

in cost to the employer could have been achieved by making an alternate, non-discriminatory compromise - that of giving smaller but equal benefits to all. Instead, respondents chose to benefit younger workers at the expense of older ones, which the Appellate Court condoned.

The characterization of respondents' compensation policy as a necessary negotiated compromise is but a thin disguise for the true justification relied on - that of cost. The argument that economic costs of granting equal benefits may be raised as a reasonable factor other than age is untenable by virtue of the facts of the case and the weight of judicial precedent.

In reversing the trial court, the Appellate Court rejected a line of decisions holding that cost may not

be raised as a justification for discrimination, and instead relied on only one authority, the dissenting opinion of Justice Rhenquist in the denial of certiorari in Markham vs. Geller, 451 U.S. 945 (1981). See E.E.O.C. vs. Westinghouse, 725 F. 2d. 211 (3rd Cir. 1983), cert. denied, U.S. , 105 S. Ct. 92 (1984); E.E.O.C. vs. City of Altoona, 723 F. 2d. 4 (3rd Cir. 1983); cert. denied, U.S. , 104 S. Ct. 2386 (1984); Geller vs. Markham, 635 F. 2d. 1027 (2nd Cir. 1980), cert. denied 451 U.S. 945 (1981); Laugeson vs. Anaconda Co., 510 F. 2d. 307 (6th Cir. 1975). (All holding cost savings may not be raised to justify age discrimination).

Geller involved a school board policy of hiring less experienced teachers, which resulted in the exclusion

of a disproportionate number of older applicants. The Court of Appeals for the Second Circuit applied the disparate impact theory and rejected defendant's argument that the policy was a "necessary cost-cutting gesture in the face of tight budgetary constraints. Geller, supra, 451 U.S. at 946. The Court ruled that neither a showing of disparate impact nor disparate treatment could be defended by a cost justification. Id. at 946-7.

When the Supreme Court voted to deny certiorari, Justice Rhenquist alone argued that the case should be reviewed. In his dissent, Justice Rhenquist attacked the Second Circuit's ruling that economic considerations could not justify the policy of hiring less experienced teachers and argued that reliance on 29 C.F.R. §860.103(h) was inappropriate. Justice

Rhenquist reasoned that since the policy referred only to experience and made no express reference to age, defendant's position was not an assertion that "the average cost of employing older workers is higher than the average cost of employing younger workers", as prohibited by the regulation. Geller, supra, at 948.

This rationale ignores the necessary correlation between age and experience which was demonstrated by the showing of disparate impact. The school board admitted that hiring less experienced workers saved them money, and it was additionally shown that by favoring such applicants a larger number of older teachers were excluded from employment. Thus, the facts of Geller demonstrated that the school board hired younger workers to cut costs. To adopt this

literal interpretation, as Justice Rhenquist suggests, which refuses to recognize this blatant age discrimination is improper.

As this Court is well aware, the sole significance of the denial of a petition for writ of certiorari by the United States Supreme Court is that fewer than four members of the Court have deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion. Maryland vs. Baltimore Radio Show, Inc., 338 U.S. 912, 70 S. Ct. 252, 94 L. Ed. 562 (1950). Clearly, the opinion of Justice Rhenquist should have no precedental value.

However, in the analysis made by the Superior Court of New Jersey, Appellate Division in this matter, the Court elevated the Rhenquist opinion

to a height where it should not have been raised. The Appellate Court erroneously relied upon the Rhenquist dissenting opinion as precedent, without a sufficient legal basis.

In the case sub judice, the absence of an express reference to age should not prevent the Court from viewing the actual impact of this labor policy - to deny the guaranteed protection afforded to the older workers by the federal and state law at the expense of a cost cutting measure. To ignore these facts and sanction such employment practices would emasculate the discrimination laws throughout the country and fly in the face of substantial precedent.

The rule against cost justification is particularly applicable in the instant case, where not only did the respondents have alternate non-discriminatory means

available for achieving cost reductions, but they were not faced with any emergent need to reduce staff or close a facility. Instead, respondents are trying to facilitate collective bargaining by sacrificing the best interests of older workers. In order to achieve a mutually agreeable contract, respondent school board and union have cut costs by denying equal longevity benefits to older workers.

Therefore, it is respectfully submitted that petitioners' right to be free from age discrimination was violated by the ruling that unions and employers may enter into collective bargaining agreements which have a discriminatory impact on older workers.

III.

The Appellate Court noted the claims of petitioners Hogan and Krichling would be barred by a previous adverse ruling of the New Jersey Division on Civil Rights. The Trial Court had awarded them damages which accrued after the date of the adverse ruling, reasoning that the violation was of a continuing nature. See Terry vs. Mercer County Freeholders, 174 N.J. Super. 249 (App. Div. 1980); mod. on other grounds 86 N.J. 141 (1981).

The relevant statute provides that a final determination by the Division shall exclude any other action based on the same grievance of the individual concerned. N.J.S.A. 10:5-27. Jurisdiction is exclusive only when the administrative proceeding regarding a transaction is pending or has been

concluded, not if it has never been instituted. Gray vs. Serruto Builders, Inc., 110 N.J. Super. 297 (App. Div. 1970), N.J.S.A. 10:5-13. An employee's cause of action accrues at the time his employment opportunities are adversely affected. Morelock vs. N.C.R., 586 F. 2d. 1096 (6th Cir. 1978).

Therefore, it is petitioner's position that the continuing denial of equal benefits gives rise to a continuing, independent right to relief which is not barred by the Division's prior decision. Additionally, a new contract became effective in 1982, subsequent to the agency's decision, which not only constitutes an independent act of discrimination but also raises new facts for consideration. Namely, the respondents have adopted the policy again, with blatantly clear knowledge

of its disparate effect on older workers.

Additionally, the petitioners contend that the Division's finding of no probable cause is not a final decision in that the issues were never litigated, and petitioners were never afforded an opportunity for a hearing. In Wood vs. Garden State Paper Co., 577 F. Supp. 632 (D.N.J. 1983), it was held under similar facts that federal due process prohibited a bar to recovery, even though the Division on Civil Rights had issued of finding of no probable cause which had been affirmed by the New Jersey Superior Court. The Court nevertheless refused to apply res judicata, holding instead that plaintiff had not had a fair opportunity to fully litigate his claim. Since the Division's procedures were inadequate in that respect and because the Superior Court decision

was based only on a finding that there was sufficient evidence to support the Division's decision without an abuse of discretion, the matter was remanded.

The Wood case is applicable here, where petitioners Hogan and Krichling are not only raising claims based on ongoing, independent acts of discrimination, but have also never had the opportunity to fully litigate the issues through the administrative process. The decision in Wood rests on federal constitutional grounds, and should, therefore, control.

Additionally, in disagreeing with the Wood decision, the Appellate Court relied on state decisions which are distinguishable.

In Hermann vs. Fairleigh Dickinson, 183 N.J. Super. 500 (App. Div. 1982) cert. denied 91 N.J. 573 (1982), the

employee was complaining of an unlawful termination not a continuing violation. In Christian Bros. Inst. vs. No. N.J. Interschol. League, 86 N.J. 409 (1981), plaintiffs had entered into a concilliation agreement in which they had waived their right to further litigation.

Therefore, it is respectfully submitted that the finding of the Appellate Court that the claims of Hogan and Krichling should be barred conflicts with the controlling precedent established by the Wood Court. The ruling would also deny petitioners the protection of federal due process guarantees and deprive them of the right to be free from continuing discrimination.

CONCLUSION

In light of the above, the petitioners respectfully request that the Supreme Court of the United States grant this Petition for Certiorari.

Respectfully submitted,

CHARLES J. CASALE, JR.

CJC: LJD:rm

SUPREME COURT OF NEW JERSEY
C-163 SEPTEMBER TERM 1985

24,521

MATTEO GIAMMARIO, et al.,	:	
Plaintiffs-Petitioners,	:	
vs.	:	ON PETITION FOR CERTIFICATION
TRENTON BOARD OF EDUCATION and TRENTON ADMINISTRATORS and SUPERVISORS ASSOCIATION,	:	
Defendants-Respondents.	:	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1436-84TS
A-1599-84TS having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 3rd day of October, 1985.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

FILED
SUPREME COURT
OCT 7, 1985

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1436-84TS
A-1599-84Ts

MATTEO GIAMMARIO, et al.,

Plaintiffs-Respondents,

v.

TRENTON BOARD OF EDUCATION, a body corporate of the City of Trenton,

and

TRENTON ADMINISTRATORS AND SUPERVISORS ASSOCIATION,

Defendants-Appellants.

ORIGINAL FILE
Aug. 8, 1985
Elizabeth McLaughlin, Clerk

Submitted May 28, 1985 - Decided Aug. 8, 1985.

Before Judges King, Deighan and Bilder.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County.

Robert M. Schwartz, attorney for appellant Trenton Administrators and Supervisors Association.

Merlino, Rottkamp & Flacks, attorneys for appellant Trenton Board of Education (Robert B. Rottkamp, Jr., of counsel and on the brief).

Charles J. Casale, Jr., attorney for respondents Matteo Giammario, et al. (Louis J. DeMille, Jr., on the brief).

The opinion of the court was delivered by BILDER, J.A.D.

In this case we are asked to consider whether the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., (LAD) bars an employer and a labor union from bargaining for a multi-tiered salary schedule which operates to the detriment of older employees.[1] To put it another way, can they bargain for a multi-tiered salary schedule which unintentionally results in the payment of a lesser salary to older employees? An employer, Trenton Board of Education (Board) and a union, Trenton Administrators and Supervisors Association (TASA), appeal from a judgment of the Law Division finding that they have discriminated against plaintiff employees, members of TASA, on account of their age in violation of the LAD and awarding damages to the individuals aggregating about $50,000. The separate appeals of each defendant were consolidated by an order of February 21, 1985.

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[1] Although the opinion below describes the action as one brought under the state and federal acts (Age Discrimination Employment Act, 19 U.S.C. 623(a) et seq.), an examination of the complaint discloses plaintiffs sought relief solely under state law.

Collective bargaining agreements between TASA and the Board have provided that employees receive annual additions to their salaries based on longevity (experience in the Trenton system, plus credited service outside the sytem) beginning in the 20th year, which we sometimes will refer to as increments. The contract in effect just prior to July 1, 1979, provided for annual increments of $400 beginning in the 20th year of service and additional increments of $200 commencing on the 35th and 40th year of service.

For the period commencing July 1, 1979, a new contract was negotiated between the defendants which provided for annual increments of $600 to be paid beginning on the 20th year of service and additional $600 increments beginning the 25th, 30th, 35th and 40th years of service.

Following the salary guide which set forth the base salaries, the contract provided:

LONGEVITY

Longevity (experience in Trenton plus credited experience outside of Trenton):

20 years	$600 additional
25 years	$600 additional
30 years	$600 additional

35 years	$600 additional
40 years	$600 additional

which will also be reflected in the maximum.

Facially the provisions appeared to apply to all employees. However, the provision was interpreted by the Board to mean that new $600 increments would apply only to future anniversary dates -- that salary increments with respect to anniversary dates occurring prior to July 1, 1979 would continue to be paid at the old rates, i.e. $400 after 20 years and $200 after 35 years and 40 years. The Board's interpretation was confirmed as the contractual intent of the defendants in an arbitration proceeding in which TASA contended its members were entitled to the additional benefits commencing with the effective date of the new contract but based on prior anniversary dates.

Since the new increments were not prospectively operative with respect to employees who had already passed a longevity increment anniversary, the defendants by the contract created a multi-tiered salary schedule which discriminated against those with the greater seniority. Because of the natural correlation between sen-

iority and age, this discrimination fell most severely on the oldest employees. The longevity pay which they were receiving under the old contract was frozen at the old rate. They will receive lesser pay than the younger employees for the same period of service. As of July 1, 1984, 46 of the 92 members of TASA had been eligible for at least one longevity increase as of July 1, 1979. This group had an average age of 54.2 years. Nineteen members who became eligible for the new increased longevity increments in the following five years had an average age of 41.4 years. Plaintiffs contend this unfavorable treatment which results from their seniority amounts to age discrimination barred by our Law Against Discrimination.

Disparate Impact and Age Discrimination

Employment discrimination due to age (or any other invidious classification) is barred by LAD. "It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination ... for an employer, because of ... age ... to discriminate against such individual in compensation ...". N.J.S.A. 10:5-12a. Similar provisions are contained in the federal Age

Discrimination in Employment Act, 29 U.S.C. 623(a) (ADEA). In a sex discrimination case arising under the LAD, our Supreme Court held that the test for a prima facie showing was the same as that used in federal cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 et seq. See Peper v. Princeton University Board of Trustees, 77 N.J. 55, 81 (1978). Because the provisions of the ADEA were modeled after Title VII and are nearly identical in wording and purpose, Title VII standards are applied to ADEA cases. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Lorillard v. Pons, 434 U.S. 575, 584 (1978). "(T)he prohibitions of the ADEA were derived in heec verba from Title VII". Lorillard at 584. We thus conclude, as did the judge below, that plaintiffs' contentions should appropriately be analyzed by examination of federal cases arising under Title VII and the ADEA.

Under Title VII, the United States Supreme Court has recognized two separate theories of relief: disparate treatment and disparate impact.

"Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266, 97 S. Ct. 555, 50 L. Ed. 2d 450. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

.....

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. See infra, at 1861. Proof of discriminatory motive, we have held, is not required under a disparate impact theory. Compare, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430-432, 91 S. Ct. 849, 28 L.Ed. 2d 158, with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806, 93 S.Ct. 1817, 36 L.Ed.2d 668.

[Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, 336, 97 S.Ct. 1843, 1854-1855 n. 15, 52 L.Ed. 2d 396, 415 n.15 (1977)]

[Peper v. Princeton University Board of Trustees, supra, at 81-82]

Here we are concerned only with disparate impact. The lack of discriminatory motive has been stipulated.

Although academics have generally criticized the view that a disparate impact theory should be used in age discrimination cases, see "A Case Against Extending the Adverse Impact Doctrine to ADEA," 10 Employee Relations Law Journal 437 (1984); Note, "Age Discrimination and the Disparate Impact Doctrine," 34 Stanford L. Rev. 837 (1982); and citations collected at footnote 9, Note, "Disparate Impact Analysis and the Age Discrimination in Employment Act," 68 Minn. L. Rev. 1038, 1039 (1984); contra 68 Minn. L. Rev. 1038, federal courts have generally applied the theory. Leftwich v. Harris-Stowe College, 702 F.2d 686 (8 Cir. 1983); Geller v. Markham 635 F.2d 1027 (2 Cir. 1980), cert. den. 451

U.S. 945 (1981);[2] United Indep. Flt. Off. v. UAL, 572 F. Supp. 1494 (N.D.Ill. 1983), aff'd 756 F.2d 1274 (7 Cir. 1985); Popko v. City of Clairton, 570 F.Supp. 446 (W.D.Pa. 1983); E.E.O.C. v. Borden's, Inc., 551 F.Supp. 1095 (D.Ariz. 1982), aff'd 724 F.2d 1390 (9 Cir. 1984); Stone v. Western Airlines, 544 F.Supp. 33 (C.D.Cal. 1982). See E.E.O.C. v. Borden's, Inc., 724 F.2d 1390 (9 Cir. 1984); Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11 Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531 n.1 (9 Cir. 1981); Roe v. International Harvester, 604 F. Supp. 57 (N.D.Ind. 1984); Woodfield v. Heckler, 591 F. Supp. 1390 (E.D. Pa. 1984); Grecco v. Spang, 527 F. Supp. 978 (W.D.Pa. 1981). The Third Circuit declined to decide the issue in Massarsky v. General Motors Corp., 706 F.2d 111 (3 Cir. 1983), cert. den. ___ U.S. ___, 78 L.Ed. 2d 314 (1983). However, its District Courts have applied the disparate impact theory in age discrimination cases, citing Massarsky as

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[2]In a dissent from the denial of certification, Justice Rehnquist said: "This court has never held that proof of discriminatory impact can establish a violation of ADEA", 451 U.S. at 948. This view has not slowed the application of the impact theory to age discrimination cases.

as authority. See Woodfield v. Heckler, supra at 1397; Popko v. City of Clairton, supra at 451.

We conclude therefore that the trial judge was correct in applying the impact analysis to the facts of this case and in his conclusion that plaintiffs had made a prima facie impact case of discrimination. His findings on this score are supported by the record. See State v. Johnson, 42 N.J. 146, 162 (1964). This conclusion, however, was not determinative of the case because it did no more than shift the burden of persuasion to the defendants to show their longevity plan was legally justified. Section 4(f) 9L) of the ADEA allows an employer to defend a claim of age discrimination on the ground that the differentiation was based on "reasonable factors other than age." 29 U.S.C. 623 (f) (1). The judge

below found that the only reasons for the contractual distinctions were economic - that it was significantly more expensive to have to pay everyone on an equal basis than to pay those who had already increments at the old rate. This economic justification he found not to be "a reasonable factor other than age." In so doing, he followed the general rule that cost cannot be a defense to a discrimination claim. See Geller v. Markham, supra at 1034. It is here that we part company with the Law Division judge.

Although monetary considerations cannot normally justify policies which by way of impact discriminate on the basis of age, i.d., the rule must be different with respect to labor negotations - an exercise in which fiscal effect is a primary factor. As TASA noted in its brief, it is inevitable in the negotiation

process that some employees will fare better than others. If facially neutral negotiating compromises which turn out to have an unintended disparate impact on people of differing age are discrimination under ADEA or LAD, labor negotiations become chaotic. Compromises will often lie in the area of retroactivity which by definition will relate to seniority, a quality with a high correlation to age. Making new benefits prospective only is a rational and usual compromise often employed in negotiations. In his dissent to the denial of certiorari in Geller, Justice Rehnquist questioned the rejection of cost justification. 451 U.S. at 948. Our research has disclosed no case in which age discrimination has been found because incidental collateral effects of a salary scale turn out to be fortuitously adverse to an older

group of employees. It is our view that in the absence of intentional discrimination, i.e., proof of discriminatory intent and purpose, a facially neutral provision in a labor contract which impacts adversely on an older age group in an incidental manner does not violate the ADEA or the LAD. When such provisions are challenged, plaintiffs are limited to a disparate treatment theory. Whether this is so because the impact theory does not apply or the nature of the bargaining process is "A reasonable factor other than age" is a philosophical question we need not resolve.

Although our determination as to the age discrimination claim makes consideration of appellants' remaining contentions unnecessary, we deem it useful to note that the claims of plaintiffs Hogan and Krichling are, in any event, barred by the previous adverse ruling on the same grievance in the

Division on Civil Rights. Hermann v. Fairleigh Dickinson Univ., 183 N.J. Super. 500 (App. Div. 1982), certif. den. 91 N.J. 573 (1982). These plaintiffs filed age discrimination complaints with the Division which resulted in findings of no probable cause. They did not appeal that ruling to the Appellate Division but instituted this action in the Law Division. The final determination of the Civil Rights Division "exclude(d) any other action ... based on the same grievance." N.J.S.A. 10:5-27. Although it is true that violation of the LAD, if it had existed, was of a continuing nature for the purpose of determining whether a claim is barred, see Terry v. Mercer Cty. Freeholders Bd., 173 N.J. Super. 249, 253 (App. Div. 1980), mod. on other grounds 86 N.J. 141 (1981), the issues raised with respect to the new period were precisely

the same as those already litigated and determined by the Division on Civil Rights. See State v. Gonzalez, 75 N.J. 181, 186-187 (1977); Hermann v. Fairleigh Dickinson Univ., supra. Having had their day in court, they could no longer litigate the matter. To the extent that Wood v. Garden State Paper Co., 577 F. Supp. 632 (D.N.J. 1983) holds to the contrary, we disagree with it. See Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938); Christian Bros. Inst. v. No.N.J. Interschol. League, 86 N.J. 409, 415-416 (1981).

Reversed.

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF
NEW JERSEY-MERCER
COUNTY
DOCKET NO. L-18817-83

MATTEO GIAMMARIO, et al.,

Plaintiffs, Civil Action

vs. OPINION

TRENTON BOARD OF EDUCATION,
et al.,

Defendants,

Decided October 1, 1984

Charles J. Casale, Jr. for plaintiffs,

Robert B. Rottkamp, Jr. for defendant Trenton Board of Education (Merlino, Rottkamp & Flacks, attorneys).

Robert M. Schwartz for defendant Trenton Administrators and Supervisors Association.

LEVY, J.S.C.

Plaintiffs bring this action against the Trenton Board of Education and the Trenton Administrators and Supervisors

Association, a labor organization, claiming that because of their ages, they have been deprived of certain salary benefits in violation of the New Jersey Law Against Discrimination and the federal Age Discrimination Employment Act.

The plaintiffs allege that they, among a group of 46 employees eligible for at least one milestone of longevity increment on July 1, 1979, were denied their proper pay and thus received, and will continue to receive, unequal wages (in the form of disparate longevity payments) for the same periods of service as the remaining members of TASA.

STIPULATED FACTS

The parties have stipulated certain facts. All of the plaintiffs were administrators in the employ of the Trenton Board of Education between July 1, 1979 and June 30, 1984 except for some who

retired during that period of time. The Board of Education is the organization which governs the affairs of the school district of the City of Trenton and is an "employer", as that term is defined under the Age Discrimination Employment Act (ADEA), 29 U.S.C.A. 630(b) and the New Jersey Law Against Discrimination. N.J.S.A. 10:5-5. The Trenton Administrators and Supervisors Association (TASA) is a labor organization with the meaning of both acts as well. See. 29 U.S.C.A. 630(d) and N.J.S.A. 10:5-5(c).

Before July 1, 1979, the employment contract berween TASA and the Trenton Board of Education provided for a $400 per year increment for all employees, from and after their 20th year of employment. There were additional annual increments of $200 per year after the 35th and 40th years. The two defendants negotiated for

a comprehensive contract, providing for wages, hours and working conditions, which was agreed to and made effective July 1, 1979. The new contract provides for an annual increment of $600 to be paid to all employees after their 20th year of employment and additonal $600 increments after their 25th year, 30th year, 35th year and 40th year.

This contract has been interpreted by the defendants to mean that employees who have reached their longevity anniversaries prior to the effective date of the 1979 contract are not eligible for a payment at the increased rate ($600 per year during the contract period until the next milestone is reached). This interpretation was confirmed as the contractual intent of the defendants in an arbitration proceeding between TASA and the board. Therefore, although the plaintiff, Matteo

Giammarrio, passed his 20th year of service in 1973, after July 1979 he received a longevity increment of only $400 pursurant to the prior contract rather than one of $600 under the 1979 contract. Similarly, although he passed his 25th year of credited service in 1978, he received no increased longevity after July 1, 1979 because the prior contract did not recognize the 25th year as a milestone. However, under the 1979 contract, when he reaches his 30th year of service, he will receive an annual increment of $600, but only continue to receive an increment of $400 for his service from 20 to 30 years with the Board of Education.

A renewal contract of July 1, 1982 has similar provisions and the defendants have continued to intepret it in the same manner. Therefore, plaintiffs have been denied increased longevity payments because they attained their longevity milestones

or anniversaries prior to the effective date of the two most recent contracts.

Several documents were admitted into evidence by stipulation. They were the two contracts negotiated by the defendants a list of TASA members employed as of July 1, 1979 totalling 92 people, a list of employees with 20 years of service as of July 1, 1979 and a supplemental list of employees with 20 years of service as of that same date.

These stipulations yield the following calculations. As of July 1, 1984, 65 of the 92 members of TASA were eligible to receive longevity pay increases. Of those, 46 had been eligible for at least one longevity increase as of July 1, 1979. That is, 46 people in this group had at least 20 years of credited service with the Trenton Board of Education as of July 1, 1979. The average age of those 46 persons

was 54.2 years. 18 of these 65 TASA members had not yet served 20 years in the Trenton School System and their average age was 41.6 years. One other person had not yet served 20 years in the Trenton School System and his age on July 1, 1979 was 38 years. Everyone of the 65 supervisors or administrators who received longevity pay as of July 1, 1984 was between ages 40 and 70 on July 1, 1979 except for that one person whose age was 38. As of July 1, 1984, everyone who was eligible for longevity pay increments in this group of employees was between the ages of 40 to 70.

Finally, it was stipulated that the average age of the TASA members who served on the contract negotiating committee from 1979 to 1982 was, as of July 1, 1979, only 45.18 years, each plaintiff voted against the ratification of each contract

and the plaintiffs' total loss of wage benefits for longevity increments is $48,400.00 as of July 1, 1984.

THE STATUTE OF LIMITATIONS

The defendants argue that the plaintiffs are barred from bringing the within action because of the statute of limitations found in the ADEA at 29 U.S.C.A. Sec. 626(e)1 or 2 which provide for a two year period of limitations after the cause of action accrued or a three year limitation if there was a willful violation. Although the agreement was to begin as of July 1, 1979, it was not ratified by the Board of Education until October 23, 1979. Thereafter, plaintiff Hogan filed a complaint with the E.E.O.C. on March 12, 1980, and the applicable statute of limitations was tolled when E.E.O.C. found there was probable cause to determine the existence of age discrimination and gave notice of the

tolling of the statute of limitations on December 4, 1980. On May 27, 1981, the E.E.O.C. sent a letter to the Trenton Board of Education advising that informal conciliation had been exhausted and that the letter would serve as notice that the tolling of the statute of limitations was removed. There is no indication of the date on which this letter was received by the defendant Board. The complaint was filed on March 23, 1983. Therefore, considering the tolling period, the time between the ratification of the agreement by the Board of Education and the filing of the complaint was just three weeks short of the three year period of limitations.

Each time each plaintiff received a salary payment, he would receive pay at the old $400 rate while another TASA member who reached a milestone after

July 1, 1979 would receive pay at the new $600.00 rate. If this constitutes age discrimination, it is a continuing discriminatory act based on a continuing discriminatory policy. See, E.E.O.C. v. Westinghouse, 725 F.2d 211 (3rd Cir. 1983). Thus, the Court must determine the willfulness of the alleged violation if there is liability under the ADEA. However, it is necessary to make that determination because N.J.S.A. 10:5-12 prohibits an employer from discriminating against an employee in compensation because of the employee's age. The relief which plaintiffs seek, including attorney's fees, is available under the state law as well as under the ADEA.

The New Jersey Law Against Discrimination requires a complaint to be filed within 180 days after the alleged act of discrimination. N.J.S.A. 10:5-1. But the payment of unequal wages has been held

to be a continuing violation for purposes of this limitation. See, Decker v. Bd. Ed. of Elizabeth, 153 N.J. Super. 470 (App. Div. 1977), certif. den. 75 N.J. 612 (1978). Further, this 180 day period is not a restriction on damages, so the plaintiffs may recover wages due from July 1, 1979 to date, even though the contract was not ratified until October 23, 1979 and regardless of the date the complaint was filed, whether or not the discrimination was willful under the ADEA.

Two plaintiffs, Walter Krichling and Charles Hogan, each filed a complaint with the N.J.Division on Civil Rights. On February 27, 1981, the Division's director determined that there was not probable cause to support Mr. Krichling's allegations and on May 29, 1979 made a similar ruling as to Mr. Hogan. Rather than appeal that ruling to the Appellate Division pursuant

to R. 2:2-3(a)(2), they brought the within action two years later. Hermann v. Fairleigh Dickinson Univ., 183 N.J. Super. 500 (App. Div. 1982), held that the complainant who chooses the administrative route is precluded from relitigating the same issue in the Superior Court except by appealing the finding of no probable cause to the Appellate Division. However, the facts of that case can be distinguished from the one at bar. There, there was a single act of discrimination alleged-discharge based on the employee's sex. Here there are continuing acts of discrimination alleged--payment of salary at a lower rate due to the employee's age. These two plaintiffs may seek damages here for any discrimination subsequent to the time periods complained of to the Division on Civil Rights.

Thus, the court must reach and decide

the basic issue: does the differential application of longevity pay emanate from a policy prohibited by the Law Against Discrimination?

DISCRIMINATORY IMPACT OF THE POLICY

The defendants say they have a facially neutral rule, based solely upon length of service rather than age of the employee. They say there was no purposeful or intentional discrimination against any class of TASA members evidenced by the adoption of the longevity policy in question. The direct evidence, stipulated by the parties, does not support a conclusion that the policy was motivated by any type of discrimination. However that does not end the matter, because there is circumstantial evidence which supports a conclusion that the impact of this longevity policy is disproportionate among age groups of TASA

members. The United States Supreme Court has held that such an impact alone is enough to support a claim of racial discrimination. See, Griggs v. Duke Power Co., 401 U.S. 424, 432 28 L.Ed.2d 158, 165 (1971). There the court noted that Congress directed the thrust of the Civil Rights Act of 1964, Title VII, to the consequences of employment practices, not simply the motivation. Thus it held that Congress burdened the employer with showing that any given requirement needed a manifest relationship to the employment in question.

Now the Third Circuit Court of Appeals, in a New Jersey case, has applied this doctrine in an age discrimination case under the ADEA. Massaraky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983). The Massarsky case, relying on Griggs, sets up the following guidelines: the plaintiff's initial burden is to show

that the policy in question had "a significant discriminatory impact." If the prima facie case is established, then the employer has the burden of proving that the discriminatory policy had "a manifest relationship to the employment in question." The employer may still fail if the employee proves that the employer used the policy "as a mere pretext for discrimination." 706 F.2d at 120.

Thus this court is directed to determine whether the plaintiffs have proved that the longevity policy adopted by the defendants "results in unfavorable treatment of a disproportionate number of members of the protected group to which plaintiff belongs." Under the ADEA the protected group is all persons between the ages of 40 and 70, and under the state law there is no specifically defined age group. The statistical proofs agreed to

by all parties demonstrates that 50% of the members of TASA were eligible to receive longevity increments in pay at the time the first contract became effective in July of 1979, and their average age was 54.2 years. During the next five years until July 1984, 19 other TASA members became eligible for longevity increments and were paid under the new higher schedule; their average age was 41.4 years. Therefore the plaintiffs and other TASA members similarly situated were significantly older than those members who became eligible for longevity pay and were paid at higher rates after the two contracts were negotiated and the offending policy adopted by the defendants.

The discriminatory effect on older members of TASA is significant and obvious. As already noted, when plaintiff Matteo Giammario was 54 years old in July of 1979, he was paid and will continue to be paid

a $400 increment for service with the board of education exceeding 25 years; also, he and everyone else receiving longevity benefits as of July 1, 1979 had an average age of 54.2 years. Nathanial Jones, aged 42 in July of 1979, is a member of the younger group of TASA members not then yet eligible for longevity pay and whose average age was 41.4 years. He reached his 20 year milestone shortly after July 1, 1979 and is being paid a $600 increment which he will continue to receive as well as a second increment for service between his 25th and 30th years with the board. Mr. Jones, thus, has an $800 annual advantage over plaintiff Giammarrio. Although this policy is avowedly based strictly on length of service, it impacts negatively on a significantly older group of TASA members.

The defendants have not established that the differential pay policy, has any bearing on work performed by supervisors or administrators in the Trenton school system. The only thing they can say is that it is significantly more expensive to have to pay all TASA members on equal pay scales for longevity milestones than to have different scales depending on length of service as of July 1979. This may be economically sound but certainly is not demonstrative of the "manifest relationship to the employement in question" required by the federal courts. This is not a "reasonable factor other than age" as permitted under section 623(b) of the ADEA. Nor is it a bona fide seniority system based on any separate category of skill or ability as found in Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir.)(1978), cited by defendants as supporting their

position. Indeed if there was a financial limit to support longevity pay increments, it should have been spread among all TASA members with at least 20 years service at rates lower than $600 per annum.

Therefore the court finds that the impact of the defendants' mid-1979 longevity policy was to discriminate against a significant number of TASA members because of their advanced ages, and there is no valid relationship between this policy and the employment of TASA members by the board of education.

DAMAGES

Plaintiffs are therefore entitled to damages, but defendants urge the court to apply this decision prospectively. To decide that issue, the court looks to whether or not this case decides a new principle of law, whether retrospective application will advance or retard the

ruling and whether payment of back salary will produce a substantially inequitable result. See, Chevron Oil Co. v. Huson, 404 U.S. 97,106-7, 30 L.Ed.2d 296,306 (1971).

The basis of looking to disparate impact of a discriminatory policy is found in Griggs v. Duke Power Co., Supra. decided in 1971. One cannot say that the within decision was unexpected or that it overruled an existing legal doctrine; it merely applied a holding of the United States Supreme Court dealing with sex discrimination to a matter of age discrimination. Also, the forgiveness of the board's obligations to the plaintiffs for the past five years will generally retard the application of the ruling, as it will let public bodies know they can always postpone the day of reckoning without fear. To do so would be patently unfair to three of the plaintiffs (Hogan. Gibson and Panaro) who have already retired

and cannot recapture their appropriate compensation for long years of service to the board of education. Similarly, because the ruling is based on age discrimination, and the reward is based on longevity of employment, it would be inequitable to require the other five plaintiffs who diligently pursued their remedies to forego compensation to which they were entitled.

As stipulated, the damages of all the plaintiffs except Messrs. Krichling and Hogan are:

Oscar Gibson	$7,200.
Eve Panaro	8,400.
Earl Murphy	5,000.
Toby Pontani	5,000.
Octavius LaCross	1,000.
Edward Hirsch	5,000.
Matteo Gimmario	4,000.
SUBTOTAL	$35,600.

These two defendants must submit by way of affidavit or certification, as to the substance of their allegations before the Division on Civil Rights. They must advise the court of the last period com-

plained of to the Division so the court can compute the damages to be awarded them here.

N.J.S.A. 10:5-27.1 affords counsel fees to the prevailing party. Plaintiffs' counsel has submitted an affidavit of services indicating 70 hours of total time dedicated to the prosecution of this matter. This is fair and reasonable, as is the rate of $100 per hour requested by counsel. Thus counsel fees of $7,000 plus costs of suit are awarded.

Mr. Casale should submit a certification and a proposed form of judgment, in accordance with this opinion, within ten days.

CHARLES J. CASALE, JR., P.A.
311 Whitehorse Ave.
Trenton, N.J. 08610
(609) 585-7711
Attorney for Plaintiffs

MATTEO GIAMMARIO, et al,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiffs,	:	LAW DIVISION MERCER COUNTY
vs.	:	
TRENTON BOARD OF EDUCATION, a body corporate of the City of Trenton, et al,	:	Docket No. L-018817-83
Defendants	:	Civil Action JUDGMENT

This matter having been opened to the Court by Charles J. Casale, Jr., P.A., attorney for the plaintiffs, Robert B. Rottkamp, Jr., Esq., appearing for the defendant Trenton Board of Education and Robert M. Schwartz, Esq., appearing for the defendant Trenton Administrators and Supervisors Association, upon the plaintiffs' Complaint; and the parties having agreed to and executed a Stipulation of Fact and Law; and the Court having considered

the pleadings and papers filed herein and the arguments of counsel; and for good cause shown;

It is on this 24th day of October 1984 ORDERED and ADJUDGED that a judgment be and hereby is entered against the defendants on behalf of the respective plaintiffs for the following damages:

(a) For Oscar Gibson in the amount of $8,700.00, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable legal rate of interest for each year;

(b) for Eve Panaro in the amount of $8,400.00, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable legal rate of interest for each year;

(c) for Charles A. Hogan in the amount of $7,800.00, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable legal rate of interest for each year;

(d) for Edward Hirsch in the amount of $5,000.00, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable legal rate of interest for each year;

(e) for Walter Krichling in the amount of $4,252.98, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable legal rate of interest for each year;

(f) for Octavius LaCross in the amount of $1,000.00, together with lawful interest for each and every year from

July 1, 1979 to the present at the applicable legal rate of interest for each year;

(g) for Karl Murphy in the amount of $5,000.00, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable rate of interest for each year;

(h) for Toby Pontani in the amount of $5,000.00, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable legal rate of interest for each year;

(i) for Matteo Giammario in the amount of $4,000.00, together with lawful interest for each and every year from July 1, 1979 to the present at the applicable legal rate of interest for each year; and it is

FURTHER ORDERED that the defendants are ordered to pay counsel fees to the law firm of Charles J. Casale, Jr., P.A., on

behalf of the plaintiffs in the amount of $7,000.00; and it is

FURTHER ORDERED that the defendants are compelled to pay the costs of suit incurred by the plaintiffs in this matter.

/s/ Paul Levy
PAUL G. LEVY, J.S.C.

CHARLES J. CASALE, JR., P.A.
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(609) 585-7711
Attorney for Plaintiffs

MATTEO GIAMMARIO, et al, Plaintiffs, vs. TRENTON BOARD OF EDUCATION, a body corporate of the City of Trenton, et al, Defendants.	SUPERIOR COURT O NEW JERSEY LAW DIVISION MERECER COUNTY Docket No. L-018817-83 Civl Action STIPULATION OF FACT AND LAW

It is stipulated by and between the parties that:

1. All of the plaintiffs were administrators in the employ of the Board of Education of the City of Trenton during the period from July 1, 1979 to June 30, 1984 or during some portion of that period as more fully disclosed in later stipulations.

2. The defendant Board of Education of the City of Trenton (hereinafter re-

ferred to as TBE) is a body corporate existing pursuant to the provisions of N.J.S.A. 18A:10-1 et seq. for the governance of the affairs of the school district of the City of Trenton, and TBE is an "employer" as that term is defind in 29 U.S.C. 630(b) and N.J.S.A. 10.

3. The Trenton Administrators and Supervisors Association is a labor organization within the meaning of N.J.S.A. 10:5-5c, consisting of a membership of school administrators and supervisors employed in the Trenton School District.

4. The Trenton Administrators and Supervisors Association is a labor organization with in the meaning of 29 U.S.C. 630(d).

5. Prior to the contract of July 1, 1979, the employment contract provided for a $400.00 per year increment for all employees, from and after their 20th year

of employment and an additional $400.00 per year increment for all employees who had 30 years longevity. The contract also provided additional annual increments of $200.00 per year for the 35th and 40th years.

6. In 1979 the Trenton Administrators and Supervisors Association (TASA) entered into negotiations with the TBE which resulted in a comprehensive contract providing for wages, hours and working conditions effective July 1, 1979.

7. The allegations of Paragraph 6 of Count One and Paragraph 1 and 2 of Counts 2 through 9 shall be taken as true. However, paragraphs 8 and 9 of Court One are not stipulated.

8. The allegations of Paragraph 7 of the Amended Complaint shall be taken as true.

9. The agreements between TASA and TBE effective July 1, 1979 and July 1, 1982 shall be marked in evidence as joint exhibits J-1 and J-2.

10. The list of TASA members employed as of July 1, 1979 shall be marked in evidence as J-3.

11. The list of employees with 20 years service as of July 1, 1979 shall be marked in evidence as joint exhibit J-4.

12. The supplemental list of employees with 20 years of service as of July 1, 1979 shall be marked in evidence as joint exhibit J-5.

13. The average age of the TASA members who were found by defendants to be ineligible for longevity payments as of July 1, 1979, 53.89 years.

14. The average age of the TASA employees who reached the first milestone after July 1, 1979, but during the contract

period, was, as of July 1, 1979, 46.65 years.

15. The claimed loss of longevity payments as to each plaintiff, apart from inrerest, is as follows: (See exhibit J-6)

Matteo Giammario	$4,000.00
Oscar Gibson	7,200.00
Edward Hirsch	5,000.00
Charles Hogan	7,800.00
Walter Krichling	5,000.00
Octavius LaCross	1,000.00
Earl Murphy	5,000.00
Eve Panaro	8,400.00
Toby Pontani	5,000.00
total	$48,400.00

16. The arbitrators award entered by Bernard L. Balicer shall be marked in evidence as joint exhibit J-7.

17. The arbitrator's award was based on the grievance filed by Hogan with TASA thereafter becoming the charging party on behalf of the class.

18. The plaintiff Oscar Gibson complained of age discrimination relating to the contract marked J-1, and the dis-

position of that complaint is as set forth in the letter of December 29, 1981, signed by Spencer H. Lewis, Jr., Regional Attorney. The letter shall be marked in evidence as J-8.

19. The plaintiffs Walter Krichling and Charles Hogan made civil rights complaints against TBE to the State Division on Civil Rights and the matters were disposed of as set forth in the documents to be marked in evidence as J-9.

20. It is stipulated by the parties that each plaintiff would testify that he/she voted against the ratification of the contracts marked as J-1 and J-2.

21. The plaintiffs stipulate that they can present no direct evidence of the state of mind or motive of employees or agents of defendants as to a specific intent to discriminate against the older employees in the bargaining unit.

22. The average age of the TASA members that served on the 1979 to 1982 contract negotiating committee was as of July 1, 1979, 45.18 years.

Dated:

ROBERT B. ROTTKAMP, JR.
Attorney for Defendant

ROBERT M. SCHWARTZ
Attorney for Defendant

CHARLES J. CASALE, JR.
Attorney for Plaintiffs

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1516

In The

Supreme Court of the United States

October Term, 1985

MATTEO GIAMMARIO, OSCAR GIBSON, EDWARD HIRSCH, CHARLES HOGAN, WALTER KRICHLING, OCTAVIUS LA CROSS, EARL MURPHY, EVE PANARO, and TOBY PONTANI,

Petitioners,

v.

TRENTON BOARD OF EDUCATION and TRENTON ADMINISTRATORS and SUPERVISORS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITON TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the New Jersey Law Against Discrimination bars an employer and a labor union from bargaining for a multi-tiered salary schedule which may unintentionally result in the payment of a lesser longevity benefit to older employees who had previously passed longevity milestones.

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COUNTERSTATEMENT OF THE CASE

Plaintiffs are, or have been, employees of defendant, Trenton Board of Education (Board), and members of defendant, Trenton Administrators and Supervisors Association (TASA). Prior to July 1, 1979, the negotiated bargaining agreement between the Board and TASA provided for a $400.00 per year increment for employees from and after their 20th year of employment and $200.00 per year from and after the 35th and 40th years.

For the period commencing July 1, 1979, a new contract was negotiated between defendants which provided for annual increments of $600.00 from and after the 20th, 25th, 30th, 35th and 40th years of service.

It is unquestionable and admitted by the defendants Board and Association (TASA), that the clear intent at the negotiating table and at the ratification meetings was that there would be no retroactive application of the new contract to those employees who had already passed the longevity milestones. The longevity provision has been interpreted and applied uniformly to mean that employees who have reached their longevity anniversaries prior to the effective date of the 1979 contract are not eligible for a payment at the increased rate of $600.00 per year until the next milestone is reached. Again, there would be no retroactive application of the new contract provision to those who had previously passed the appropriate milestones. This interpretation was confirmed as the contractual intent of the defendants in an arbitration proceeding and award between TASA and the Board.

For example, although plaintiff, Giammario, passed his 20th year of service in 1973, after July 1, 1979, he re-

ceived the prior longevity increment of $400.00 pursuant to the prior contract rather than one of $600.00 under the 1979 contract. Similarly, although he passed his 25th year of credited service in 1978, he received no increased longevity after July 1, 1979, because the prior contract did not recognize the 25th year as a milestone. However, under the 1979 contract, when he reaches his 30th year of service, he will receive an annual increment of $600.00, and continue to receive an increment of $400.00 for his 20th year of service with the Board.

A renewal contract of July 1, 1982, has similar longevity provisions and has been applied uniformly to all employees by the defendants.

Plaintiffs and defendants entered into a stipulation of facts and on September 17, 1984, presented their respective positions before the Honorable Paul G. Levy, J.S.C.

On October 1, 1984, Judge Levy issued a written opinion finding that the longevity provision discriminatorially impacted on the basis of age contrary to the New Jersey Law Against Discrimination (LAD).

On December 12, 1984, defendant Board filed a notice of appeal to the Appellate Division from the whole of the final judgment entered by the court on October 24, 1984.

By decision dated August 8, 1985, the New Jersey Appellate Division reversed the trial court finding that the incidental collateral effects of the longevity provision, in the absence of intentional discrimination, did not constitute age discrimination in violation of the LAD.

On October 3, 1985, the New Jersey Supreme Court issued an Order denying the petition for certification.

On December 31, 1985, this Petition for Writ of Certiorari was mailed to the Clerk of the United States Supreme Court.

———o———

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS CLAIM OF ARBITRARY DISPARATE IMPACT IS WITHOUT MERIT.

A. Both the State Trial Court and the New Jersey Appellate Division Judgment rests on Adequate and Independent State Grounds thus this Court lacks Jurisdiction.

On October 3, 1985, the New Jersey Supreme Court entered an Order denying the plaintiffs' Petition for Certification. That Petition was filed to request review of a decision of the Superior Court of New Jersey, Appellate Division which reversed the trial court. This controversy involves an age discrimination claim.

Contrary to the Statement of Jurisdiction contained in the appellants' brief, both the trial court and the appellate court decided the matter on state grounds and not a federal statute. Though the trial courts reliance upon the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, is not clear, there appears to be sufficient indication that the court based its decision on state grounds. In discussing the limitations issue the court stated:

> "Thus the court must determine the wilfulness of the alleged violation if there is liability under the ADEA.

> However, it is unnecessary to make that determination because *N.J.S.A.* 10:5-12 prohibits an employer from discriminating against an employee in compensation because of the employee's age." (A-18)

The most telling indication is the trial courts statement:

> "Thus the court must reach and decide the basic issue: does the differential application of longevity pay emanate from a policy prohibited by the [New Jersey] Law Against Discrimination." [*N.J.S.A.* 10:5-1 *et seq.*] (A-19).

Thus, clearly the trial court's decision was based upon state grounds. The State Appellate Court made it absolutely clear that it was deciding the issue based upon state grounds. In its decision it states:

> "In this case we are asked to consider whether the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (LAD) bars an employer . . . " (A-3)

Again, the Appellate Court made it clear in its discussion of the merits that the basis of its decision was the state anti-discrimination law.

> "Employment discrimination due to age (or any other invidious classification), is barred by LAD. 'It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination . . . for an employer, because of . . . age . . . to discriminate against such individual in compensation . . . ' *N.J.S.A.* 10:5-12a. Similar provisions are contained in the federal Age Discrimination in Employment Act, 29 *U.S.C.* 623(a) (ADEA). In a sex discrimination case arising under the LAD, our Supreme Court held that the test for a *prima facie* showing was the same as that used in federal cases arising under Title VII of the Civil Rights

Act of 1964, 42 U.S.C. § 2000e-2 *et seq.* See *Peper v. Princeton University Board of Trustees*, 77 *N.J.* 55, 81 (1978)." (A-6)

Thus, it is obvious that this matter was decided upon the New Jersey Law Against Discrimination and not the federal ADEA. However, the court justifiably and appropriately analyzed state and federal cases arising under Title VII and the ADEA.

The New Jersey Supreme Court denied appellants' petition for certification without explanation.

The United States Supreme Court cannot review a case, even though it may contain a federal question, if there is an adequate state ground that supports the decision of the state court. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875). Thus, there can be no review if the state court has decided the case on some ground of state law, and has not reached a federal question that may be present. *McCoy v. Shaw*, 48 S. Ct. 519, 277 U.S. 302, 72 L.Ed. 891 (1928); *Johnson v. New Jersey*, 86 S.Ct. 1772, 1782, 384 U.S. 719, 735, 16 L.Ed. 2d 882 (1966).

Likewise, there can be no review where the state court has decided both the state and federal questions, if its decision of the federal question was unnecessary in light of its disposition of the state question. *Fox Film Corp. v. Muller*, 56 S.Ct. 183, 296 U.S. 207, 80 L.Ed. 158 (1935); *Jankovich v. Indiana Toll Road Comm.*, 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed. 2d 439 (1965). See also, *Lamb Enterprises, Inc. v. Kiroff*, 399 F. Supp. 409 (D.C. Ohio, 1975) reversed on other grounds 549 F.2d 1052, certiorari denied 97 S.Ct. 2927, 431 U.S. 968, 53 L.Ed. 2d 1064 (1976). Additionally, this Court is bound to accept interpretation of

state law by the highest court of the State. *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n.*, 96 S.Ct. 2308, 426 U.S. 482, 49 L.Ed. 2d 1 (1976); *Groppi v. Wisconsin*, 400 U.S. 505, 507, 91 S.Ct. 490, 491, 27 L.Ed. 2d 571 (1971).

Clearly, the Court cannot review this matter based upon adequate state grounds supporting the decision.

B. Review Should Not be Undertaken as there Exists no Important and Substantial Federal Question to Decide as the State Courts merely applied the well-founded Principles of Griggs v. Duke Power Co. to the Statutory Scheme of the New Jersey Law Against Discrimination.

Under the statute, 28 *U.S.C.* § 1257(3), there must be a federal question in order to invoke the jurisdiction of the Supreme Court. Whether there is such a question in the case is a matter that the Court must decide for itself. *Angel v. Bullington*, 67 S.Ct. 657, 330 U.S. 183, 91 L.Ed. 832 (1947). The mere presence of a federal question will not permit review, however, unless that federal question is "substantial." 16 Wright, Miller & Cooper, Jurisdiction § 4014; Ulman & Spears, 20 B.U.L. Rev. 501 (1940); Note, the Supreme Court Dismissal of State Court Appeals for Want of Substantial Federal Question, 15 Creighton L. Rev. 749 (1982).

Assuming, *arguendo*, that the lower courts used the federal statute, the ADEA, as the basis of their decisions and that there exists a federal question, it is this defendants position that there exists no substantial federal question to justify the invoking of the Courts jurisdiction.

This age discrimination in employment matter is not unique either in the facts or the law.

The New Jersey courts simply applied the facts of this case to the well founded principles of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed 2d 158 (1971) with the statutory scheme of the New Jersey Law Against Discrimination. The courts below sought the assistance of the legislative history of the A.D.E.A. and particularly § 623(F) (1) at 29 U.S.C. § 623. The court merely applied the impact theory and business necessity justification and found that labor negotiations, with economic considerations a primary factor, negated a finding of age discrimination in violation of the New Jersey LAD. It is merely an application of somewhat unique facts to established law.

Petitioners attempt to portray the New Jersey Appellate Division judgment as using economic cost as a basis for justifying alleged age discrimination. This could not be further from the truth. The trial court erroneously concluded initially, based upon essentially irrelevant statistics, that age discrimination in violation of the LAD existed. The court then, in attempting to apply the disparate impact theory to the federal law, found that economic or monetary considerations generally cannot be raised as a defense to a discrimination claim unless they have a relationship to the employment practice in question. The court, therefore, found no defense existing and in favor of plaintiffs. At no time did the trial court even consider defendants arguments as they related to labor negotiations. This was manifest error.

Petitioners mistakenly contend that the Appellate panel used economic considerations solely as a defense to

the discrimination claim. This is a misreading of the decision. The Appellate panel correctly found that labor negotiations constitute a clear, manifest relationship to the questioned employment practice, ie., salary scales, and that fiscal effect is a primary factor.

The Court stated, "Although monetary consideration cannot normally justify policies which by way of impact discriminate on the basis of age, ie., [citing *Geller v. Markham*, 653 *F.* 2d 1027 (2 Cir. 1980), *cert. den.* 451 U.S. 945 (1981)], the rule must be different with respect to labor negotiations—an exercise in which fiscal effect is a primary factor. As TASA noted in its brief, it is inevitable in the negotiation process that some employees will fare better than others. If facially neutral negotiating compromises which turn out to have an unintended disparate impact on people of differing age are discrimination under the A.D.E.A. or LAD, labor negotiations become chaotic. Compromises will often lie in the area of retroactivity which by definition will relate to seniority, a quality with a high correlation to age. Making new benefits prospective only is a rational and usual compromise often employed in negotiations." (A-10)

The disparate impact theory of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), applies when the employer's adverse action resulted not from any discriminatory motive but simply from application of facially neutral criteria that are alleged to have a disproportionate impact on members of a protected class *and* which cannot be justified by business necessity. The legis- of by the New Jersey Supreme Court's decision in *Her-* that not all age discrimination is prohibited but only, "arbitrary age discrimination." A reflection of this is § 623

(F) (1) which clearly indicates there is no prohibition, "where differentiation is based on reasonable factors other than age . . . " 29 *U.S.C.* § 623.

The Appellate panel merely applied the facts of this case to the impact theory and found that labor negotiations with economic considerations a primary factor negated a finding of age discrimination in violation of the LAD. The Court found that in the absence of intentional discrimination, *i.e.* proof of discriminatory intent and purpose, a facially neutral provision in a labor contract which impacts adversely on an older age group in an incidental manner does not violate the ADEA or the LAD.

Petitioner's final argument is specious and is disposed of by the New Jersey Supreme Court's decision in *Hermann v. Fairleigh Dickinson Univ.*, 183 *N.J. Super* 500 (App. Div. 1982), *cert. den.* 91 *N.J.* 573 (1982), where the Court limited the multiple avenues of recourse available to plaintiffs by the election available pursuant to the New Jersey Law Against Discrimination, specifically, *N.J.S.A.* 10:5-13 and 5-27. This Court will not review the interpretation of state law by the highest court of the State.

CONCLUSION

Respondent submits that it is difficult to escalate any of the issues presented, without more, into a matter of important and substantial federal issues requiring resolution by this Court. It is a case that hardly transcends the immediate interests of the litigants and affects only the parties to this particular dispute.

An application of the consideration governing review on certiorari, *U.S. Sup. Ct. Rule* 17, 28 U.S.C.A., and the established case law, requires a denial of the petition for certification.

Respectfully Submitted,

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Dated: April 3, 1986